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Final Regulation Agency Background Document

Approving authority name	State Water Control Board
Virginia Administrative Code (VAC) citation	9 VAC 25 -260
Regulation title	Water Quality Standards
Action title	Amendment to the state's Antidegradation Policy (9 VAC 25-260-30) by designating three tributaries to Simpson Creek as Exceptional State Waters.
Document preparation date	May 1, 2006

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

The proposed amendment to the Antidegradation Policy section (9 VAC 25-260-30) of the State's Water Quality Standards regulation designates three surface waters located within the boundaries of George Washington National Forest for special protection as Exceptional State Waters (9 VAC 25-260-30.A.3.c). One of the waters proposed for Exceptional State Waters designation was removed from the proposal (Piney Mountain Branch).

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

The State Water Control Board adopted at their June 1, 2006 meeting an amendment to the Water Quality Standards regulation to designate portions of three tributaries to Simpson Creek located within the boundaries of George Washington National Forest as Exceptional State Waters.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter numbers, if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

§ 62.1-44.15(3a) of the Code of Virginia, as amended, mandates and authorizes the State Water Control Board to establish water quality standards and policies for any State waters consistent with the purpose and general policy of the State Water Control Law, and to modify, amend or cancel any such standards or policies established. The federal Clean Water Act at 303(c) mandates the State Water Control Board to review and, as appropriate, modify and adopt water quality standards. The corresponding federal water quality standards regulation at 40 CFR 131.6 describes the minimum requirements for water quality standards. The minimum requirements are use designations, water quality criteria to protect the designated uses and an antidegradation policy. All of the citations mentioned describe mandates for water quality standards.

Web Address sites where citations can be found:

Federal Regulation web site

<http://www.epa.gov/epahome/cfr40.htm>

Clean Water Act web site

<http://www4.law.cornell.edu/uscode/33/1313.html>

State Water Control Law (Code of Virginia) web site

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.2>

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.15>

The Environmental Protection Agency (EPA) Water Quality Standards regulation (40 CFR 131.12) is the regulatory basis for the EPA requiring the states to establish within the antidegradation policy the Exceptional State Waters category and the eligibility decision criteria for these waters. EPA retains approval/disapproval oversight, but delegates to the states the election and designation of specific water bodies as Exceptional State Waters.

The Office of the Attorney General has certified that the agency has the statutory authority to promulgate final text of the regulation.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

This proposed regulatory action is a necessary revision to the State water quality standards regulation. The State Water Control Board views Exceptional State Waters nominations as citizen petitions under § 9-6.14.71 of the Code of Virginia. Therefore, the Board took action on this petition for proposed designation because Department staff had concluded, based on the information available at the time of the preliminary evaluation, that the proposed designations met the eligibility requirements which a water body must meet before it can be afforded the extra point source protection provided by such a designation. The Exceptional State Waters category of the Antidegradation Policy allows the Board to designate waters which display exceptional environmental settings and either exceptional aquatic communities or exceptional recreational opportunities for added protection. Once designated, the Antidegradation Policy provides that no water quality degradation would be allowed in the Exceptional State Waters. The only exception would be temporary, limited impact activities. By ensuring that no water quality degradation is allowed to occur in waters with exceptional environmental settings and either exceptional recreational opportunities or exceptional aquatic communities, the Board is protecting these special waters at their present quality for use and enjoyment by future generations of Virginians.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

The amendment to the Antidegradation Policy (9 VAC 25-260-30), part of the State's Water Quality Standards regulation, designates portions of Blue Suck Branch, Downey Branch, and North Branch Simpson Creek for special protection as Exceptional State Waters (9 VAC 25-260-30.A.3.c).

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
 - 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
 - 3) other pertinent matters of interest to the regulated community, government officials, and the public.*
- If there are no disadvantages to the public or the Commonwealth, please indicate.*

Upon permanent regulatory designation of a water body as an Exceptional State Water, the quality of that water body will be maintained and protected by not allowing any degradation except on a very short-term basis. No new, additional or increased point source discharge of sewage, industrial wastes or other pollution would be allowed into waters designated. In addition, no new mixing zones would be allowed in the Exceptional State Water and mixing zones from upstream or tributary waters could not extend into the Exceptional State Water section.

A potential disadvantage to the public may be the prohibition of new or expanded permanent point source discharges imposed within the segment once the regulatory designation is effective that would cause riparian landowners within the designated segment to seek alternatives to discharging to the designated segment and, therefore, to have additional financial expenditures associated with wastewater or storm water treatment. The segments of the three waters under consideration for designation do not currently contain any permitted point source discharges.

The primary advantage to the public is that the waters will be protected at their present high level of quality for the use and enjoyment of current and future generations of Virginians.

The factors to be considered in determining whether a nominated water body meets the eligibility decision criteria of exceptional environmental settings and possessing outstanding recreational opportunities and/or exceptional aquatic communities are described in the Department's November 15, 2004 "04-2021, Guidance for Exceptional State Waters Designations in Antidegradation Policy Section of Virginia Water Quality Standards Regulation (9 VAC 25-260-30.A.3)." Although all of these waters proposed for designation are located on public (federal) land, those localities and businesses located near the designated waters may experience financial benefits through an increase in eco-tourism to the area because of the exceptional nature of the water body that led to its designation.

There is no disadvantage to the agency or the Commonwealth that will result from the adoption of this amendment.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar's office, please put an asterisk next to any substantive changes.

Section number	Requirement at proposed stage	What has changed	Rationale for change
9 VAC 25-260-30	Piney Mountain Branch from its headwaters downstream to the first crossing with the George Washington National Forest boundary.	Requirement deleted	Proposed water body segment was determined inappropriate for Exceptional State Waters designation.

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

Commenter	Comment
Alleghany County Board of Supervisors	Unanimously adopted a resolution on April 4, 2006 to oppose Tier III designation of Blue Suck Branch, Downey Branch, Piney Mountain Branch, and North Branch Simpson Creek because they are of the opinion the streams receive adequate protection due to their location within the George Washington National Forest.
Richard Engleman	Spoke on behalf of the Friends of the Cowpasture River stating the group is still opposed to Tier III designation. Asked why designate waters within National Forest land and wilderness areas as they are of the opinion the waters receive sufficient protection by their location on federal lands.
Eric Hostetter	Stated his opposition and resubmitted form letters of opposition from 2004 and

	2005 comment periods signed by residents in the Simpson Creek area. He stated that good stewardship of landowners in the locality have helped keep the waters in the locality clean.
Cletus Nicely	Reminded the SWCB of the Alleghany County Board of Supervisors' past resolutions of 2004 and 2005 to oppose Tier III designation of the Cowpasture River and Simpson Creek. Stated their continued opposition of the currently proposed tributaries to Simpson Creek. He does not understand why designations would be made on already tightly regulated federal lands. Stated concerns of the tributaries' designation continuing downstream to Simpson Creek and the Cowpasture River.
Stuart Shannon	Stated his opposition and he sees no reason for additional state regulation for waters in National Forest lands that are already governed by federal regulations and does not see how DEQ can regulate federal government property.
Ursula Curtis	Stated she is a landowner on one of the proposed waters, Piney Mountain Branch and where the headwaters of the stream come out of the ground is on her property and therefore not on federal lands as previously stated by DEQ. She stated her concerns regarding restriction of temporary activities in Tier III designated waters that could cause temporary lowering of water quality. Piney Mountain Branch feeds into a small pond on her property and she is concerned necessary maintenance would be prevented by a Tier III designation.
Ernie Fender	Does not see any harm in designating Tier III waters on public lands particularly in light of the fact that the federal government is considering selling portions of National Forest land. He stated the possibility exists that the land encompassing the proposed streams could be made available for development. Tier III designation would help protect the current water quality should that happen.
Ellen Ford	She serves Bath, Alleghany, and Highland Counties as the at-large-member of the Mountain Soil and Water Conservation District. She stated that she is certain that all residents of the locality care about the stewardship of the soil and water and that all care about all the waters whether they run through private property or federal lands. She supports the proposed designation and favors continuing the designation process.
Kent Ford	Stated that he supports the proposed designation. He stated that he, as a member of the committee that began this process by originally nominating the Cowpasture River and Simpson Creek for Tier III designation, has followed this entire process from its inception. He is concerned that previous designations are only occurring on public land. He believes it is a shame that the SWCB has limited the designations to National Park and National Forest lands.
Michael Jamison	Stated that he supports the designation. He then stated that high quality streams such as the ones proposed for designation are rare and that there are many miles of impaired Virginia waters. It is important to protect the high quality waters that are left.
Diana Smith	Supports the designation and stated that the National Forests are important and the waters in them should be protected.
Roy Wright	Does not understand why anyone would oppose Tier III designations on National Forest lands. He does not see the harm in providing additional protection

	<p>particularly in an area where development and point sources of pollution are unlikely to occur. He is of the opinion there is a clear message from the opposition of fear of what might happen with the designation in place. He posed the question of what is there to fear in taking steps to protect a precious resource and believes we should aggressively protect the unpolluted resources that are left.</p>
<p>The total number of citizen comment received (letter, email, and verbal comment at the public hearing) was 110. Of those, 64 (58%) were in support and 45 (41%) were in opposition. It was not readily apparent whether one of the citizens commenting at the public hearing was in support or in opposition to the proposed designation.</p> <p>Comment opposing the designation frequently stated that Tier II and their location within the National Forest adequately protect the proposed waters. Most stated that they, as citizens and/or riparian landowners, do a good job of protecting and preserving the beauty and cleanliness of the waters within their community and wish to protect their personal property rights.</p> <p>Comment supporting the designation frequently stated the proposed waters meet the necessary criteria for Tier III designation. Other comment stated that the claim made by those opposing the designation of sufficient protection provided by the waters' location within the National Forest is inaccurate as there is no law or regulation to prevent point source discharges on National Forest lands or to prevent their sale to entities that may, in turn, develop those lands.</p> <p>Comment was received from individuals supporting the designation contending that many of the form letters DEQ received in opposition contain numerous discrepancies and omissions that should render them inadmissible. Those discrepancies are:</p> <ul style="list-style-type: none"> • The short, fill-in-the-blank "Acreage" form letters were circulated and signed when Simpson Creek was nominated for Tier III and are dated from either 2004 or 2005. The dates are not current and that alone should disqualify them • They are protesting their property being designated as a Tier III stream. This does not apply now as only the four tributaries within the National Forest are being considered. Their property is not being nominated, nor is it involved with the tributaries within the National Forest. • Many do not have telephone numbers and many addresses are incomplete. 	

- **Issue:** Why is an additional layer of governmental protection necessary when a water body is already within the boundaries and under the protection of the US Forest Service?

Agency Response: The Department's Exceptional State Waters guidance on eligibility decision criteria for exceptional environmental settings includes as one of the eligible factors that "the water represents an important component of a state or national park, forest, or wildlife refuge." Therefore, the four tributaries to Simpson Creek identified within US national forest land in Virginia for consideration for designation are consistent with the Department's criteria of what constitutes an Exceptional State Water. In addition, the regulatory prohibition on new or increased point source discharges to Exceptional State Waters is an added layer of protection to the water body over that provided by the Forest Service.

- **Issue:** Form letters that are dated from previous comment periods, contain erroneous statements, and lacking appropriate contact information (full address and phone number) thereby making them inadmissible.

Agency Response: Agency public comment policy does not prohibit submission of previous comment nor prevent the inclusion of comment from previous comment periods upon request of the commenter(s) even though that comment may contain information that is irrelevant to the current proposal. All comment submitted during the comment period must be presented to the State Water Control Board for their consideration and the lack of an address does not necessarily invalidate the comment. Addresses are requested so that DEQ may meet legal obligations in 9 VAC 25-10-30 subsection K which states: *The agency shall prepare a summary of comments received in response to the NOPC and the agency's response to the comments received. The agency shall send a draft of the summary of comments to all public commenters on the proposed regulation at least five days before final adoption of the regulation.*

All changes made in this regulatory action

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
9 VAC 25-260-30	N/A	<p>(1) Little Stony Creek in Giles County from the first footbridge above the Cascades picnic area, upstream to the 3,300-foot elevation.</p> <p>(2) Bottom Creek in Montgomery County and Roanoke County from Route 669 (Patterson Drive) downstream to the last property boundary of the Nature Conservancy on the southern side of the creek.</p> <p>(3) Lake Drummond, located on U.S. Fish and Wildlife Service property, is nominated in its entirety within the cities of Chesapeake and Suffolk excluding any ditches and/or tributaries.</p> <p>(4) North Creek in Botetourt County from the first bridge above the United States Forest Service North Creek Camping Area to its headwaters.</p> <p>(5) Brown Mountain Creek, located on U.S. Forest Service land in Amherst County, from the City of Lynchburg property boundary upstream to the first crossing with the national forest property boundary.</p> <p>(6) Laurel Fork, located on U.S. Forest Service land in Highland County, from the national forest property boundary below Route 642 downstream to the Virginia/West Virginia state line.</p> <p>(7) North Fork of the Buffalo River, located on U.S. Forest Service land in Amherst County, from its confluence with Rocky Branch upstream to its headwaters.</p> <p>(8) Pedlar River, located on U.S. Forest Service land in Amherst County, from where the river crosses FR 39 upstream to the first crossing with the national forest property boundary.</p> <p>(9) Ramseys Draft, located on U.S. Forest Service land in Augusta County, from its headwaters (which includes Right and Left Prong Ramseys Draft) downstream to the Wilderness Area boundary.</p> <p>(10) Whitetop Laurel Creek, located on U.S. Forest Service land in Washington County, from the national forest boundary immediately upstream from the second railroad trestle crossing the creek above</p>	The addition of four water bodies to 9 VAC 25-260-30.A.3.c. These waters meet the eligibility criteria necessary to be designated as Exceptional State Waters.

		<p>Taylors Valley upstream to the confluence of Green Cove Creek.</p> <p>(11) Ragged Island Creek in Isle of Wight County from its confluence with the James River at a line drawn across the creek mouth at N36°56.306'/W76°29.136' to N36°55.469'/W76°29.802' upstream to a line drawn across the main stem of the creek at N36°57.094'/W76°30.473' to N36°57.113'/W76°30.434', excluding wetlands and impounded areas and including only those tributaries completely contained within the Ragged Island Creek Wildlife Management Area on the northeastern side of the creek.</p> <p>(12) Big Run in Rockingham County from its headwaters downstream to the first crossing with the Shenandoah National Park boundary and all tributaries to this segment of Big Run within the confines of Shenandoah National Park.</p> <p>(13) Doyles River in Albemarle County from its headwaters to the first crossing with the Shenandoah National Park boundary and Jones Falls Run from its headwaters to its confluence with Doyles River and all tributaries to these segments of Doyles River and Jones Fall Run within the confines of Shenandoah National Park.</p> <p>(14) East Hawksbill Creek in Page County from its headwaters downstream to the first crossing with the Shenandoah National Park boundary and all tributaries to this segment of East Hawksbill Creek within the confines of Shenandoah National Park.</p> <p>(15) Jeremys Run in Page County from its headwaters downstream to the first crossing with the Shenandoah National Park boundary and all tributaries to this segment of Jeremys Run within the confines of Shenandoah National Park.</p> <p>(16) East Branch Naked Creek in Page County from its headwaters downstream to the first crossing with the Shenandoah National Park boundary and all tributaries to this segment of East Branch Naked Creek within the confines of Shenandoah National Park.</p> <p>(17) Piney River in Rappahannock County from its headwaters downstream to the first crossing with the Shenandoah National Park boundary and all tributaries to this segment of the Piney River within the confines of Shenandoah National Park.</p> <p>(18) North Fork Thornton River in Rappahannock County from its headwaters downstream to the first</p>	
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		crossing with the Shenandoah National Park boundary and all tributaries to this segment of the North Fork Thornton River within the confines of Shenandoah National Park.	
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In 9 VAC 25-260-30 the following amendment was adopted by the State Water Control Board:

(19) Blue Suck Branch from its headwaters downstream to the first crossing with the George Washington National Forest boundary.

(20) Downy Branch from its headwaters downstream to the first crossing with the George Washington National Forest boundary.

(21) North Branch Simpson Creek (Brushy Run) from its headwaters downstream to its confluence with Simpson Creek.

Regulatory Flexibility Analysis

Please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

The water body segments proposed for designation are on federal land within the George Washington National Forest and there are no small businesses that would be impacted.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The development of water quality standards is for the protection of public health and safety, which has only an indirect impact on families.